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No. 95-428

In The

Supreme Court of the United States

October Term, 1995

CITY OF COLORADO SPRINGS AND CITY OF AURORA, COLORADO, MUNICIPAL CORPORATIONS,

Petitioners,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Colorado Court Of Appeals

REPLY BRIEF OF THE CITY OF COLORADO SPRINGS AND CITY OF AURORA, COLORADO, MUNICIPAL CORPORATIONS

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Petitioners, City of Colorado Springs, Colorado, and the City of Aurora, Colorado hereby file their reply brief in accordance with the provisions of Rule 15.6 of the rules of this Court.

I. RESPONDENTS HAVE MISSTATED THE OPERATIVE FACTS.

Before responding to those new arguments raised in the Respondents' briefs, it is incumbent upon the cities to bring to this Court's attention certain misstatements of fact contained therein.

First, the Board of County Commissioners of the County of Eagle ("Eagle County") misstates facts in an effort to prove that no taking has occurred on this record.[1] Attempting to show that the cities may have alternative uses for their water rights which are not affected by the permitting process, Eagle County states that " . . . the cities moved to restrict the scope of the hearing, filing a Motion in Limine that asserted that Eagle County lacked authority to consider *alternatives to the specific project features* proposed in the cities' application." (emphasis added) Eagle County Br. in Opp'n at 4. This is untrue. Rather, the cities merely moved to exclude evidence as to "alternative projects," i.e., completely different projects located at different sites, such as those explored in the alternatives analysis which was a part of

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[1] The misstatement creates confusion, but ultimately serves little purpose. As discussed below, the question presented to this Court is not whether a taking in fact has occurred, but whether the Cities have standing to challenge a taking. *See infra* pp. 8-9.

the federal EIS process.[2] Eagle County voluntarily *granted* the motion, stating:

> The following is our ruling on Motion No. 2 filed by the Cities. The Cities had requested that evidence pertaining to the alternative projects not be considered in this hearing. It is our view that there are two categories of evidence on alternative projects: One, the first category pertains to alternative projects totally different and referring to totally different projects.
>
> Number two, *the second category refers to alternative features* within the general scope purviewed under the pending application. The first category of evidence includes testimony to the effect that, rather than construct the Homestake II Project or some variant of it, the Cities should build the Eagle-Piney Project or participate in the Green Mountain Exchange. We rule that evidence on this nature – of this nature will not be admitted.
>
> But two, *the second category pertaining to the features of the project,* to this extent, evidence submitted indicates that alternatives to the proposed project will mitigate environmental

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[2] It must not be forgotten that the cities' federal permits, water right decrees, and Congressional exemption were all tied to the specific project for which an application was filed. The County's statement that "[a]s a consequence of the cities' motion in limine and the Board's action thereon, the application review process did not involve a categorical determination of whether the cities could exercise their water rights within the Eagle River Basin," ignores the fact that the entire "Basin" covers a large geographic area, well beyond the County boundaries, and encompasses extensive river reaches upon which the cities held no appropriative water rights.

> consequences of the project, including damage to the wetlands, water quality, solid waste disposal and so forth. *We believe that such evidence should be admitted in the record. As a matter of fact, even in the Cities' briefs and their motion they conceded that this type of evidence is contemplated in the submittal requirements of the regulation.* (emphasis added)

Transcript of Public Hearing, Volume V, April 24, 1987 at pp. 1136-1137. Hence, evidence was received relative to changes in project features for purposes of mitigating environmental impacts.

Second, on a related note, Eagle County states that the cities' application was a "take it or leave it" proposition. Eagle County Br. in Opp'n at 4. This also is categorically untrue. The cities, in conjunction with their participation in the extensive County hearing process, tendered mitigation proposals in a variety of areas, including: the movement of trails away from water diversion sites, basin-wide cleanup efforts associated with mine runoff, implementation of no wetland loss requirements, use of manual labor rather than heavy equipment, assistance with downstream water treatment costs, payment of additional security costs associated with project construction, noise abatement measures, changes in truck and other equipment scheduling, establishment of buffer zones for sediment control, water quality monitoring, and aquatic life monitoring. Over 200 pages of transcript testimony was presented to the Colorado Court of Appeals on these matters. Combined Answer and Reply Br. of Cities of Aurora and Colorado Springs, Addendums 30, 31 and 41, 93CA386 and 93CA412.

Third, Eagle County states that "the cities next ask this Court to decide whether federal law implicitly preempts all of Eagle County's attempts to regulate environmental effects of the cities' water project." Eagle County Br. in Opp'n at 8.[3] The cities have not made such an argument. Rather, the cities have conceded that regulatory entities may impose reasonable environmental mitigation conditions in accordance with this Court's decision in *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987). See App. 249a-256a, 263a. However, the County is not free to deny a land use permit for a federally approved project located entirely on federal lands.

Fourth, both Eagle County and the Holy Cross wilderness Defense Fund ("Fund") claim that the cities never preserved for appeal the question of federal preemption. A review of the record below discloses that this assertion is also false. The Eagle County District Court entered findings *favorable* to the cities' federal preemption argument, i.e., that the County lacked the power of denial.

> Section III of the Board's Resolution was a denial of a special use permit. As stated above, the County does not have the authority to deny land use on federal land which has been approved by the federal agencies with responsibility for regulating the federal land in question. . . . The Board *may regulate activities which cause environmental impacts* but not completely prohibit a federal land use. (emphasis added)

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[3] Eagle County makes the same erroneous statement at p. 19 of its Brief in Opposition.

App. 188a-189a. The District Court reiterated its prior conclusion in its decision following remand:

> . . . Furthermore, the holdings in *California Coastal Commission v. Granite Rock*, 480 U.S. 572 107 S.Ct. 1419, 94 L.Ed 2d 577 (1988) and *Columbia Basin Land Protection Ass'n v. Schlessinger*, 643 F.2d 585 (9th Cir. 1981) support their [cities] contention that a county may not deny a permit to operate a federally approved project on federal land.

App. 201a, 320a-329a. The district court then ruled in favor of the cities, finding that the County had acted unlawfully in denying the requested land use permits. App. 203a-205a.

On appeal, the County raised the issue of "whether the Board is prohibited on federal preemption grounds from regulating federally-approved activities on U.S. Forest Service lands in order to mitigate or reduce their environmental impacts. . . . " App. 241a.[4] In response, the cities noted that the district court had properly relied upon the decisions in *Brubaker v. Board of County Comm'rs*, 652 P.2d 1050 (Colo. 1982) and *Granite Rock, supra*, with respect to the issue of denial as a matter of federal preemption. Though it may be possible to impose "reasonable state environmental regulations," the County could not seek to prohibit the activity on federal lands by *denying* the permit. App. 252a-256a. When the Colorado

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[4] The cities did seek clarification from the Colorado Court of Appeals as to whether denial was appropriate under the Colorado Constitution and state statues, noting at page 10 of its Opening Brief that the lower court had already addressed the issue in the context of federal preemption. See App. 201a.

Court of Appeals reversed the district court decision and found in favor of the County, the cities argued that it should reconsider its decision, for though the regulation of environmental impacts may be appropriate, the County could not veto or deny the permits for the federally approved project located on federal lands. App. 263a-264a.[5]

II. THIS COURT SHOULD REVIEW THE ISSUE OF MUNICIPAL STANDING UNDER THE FIFTH AMENDMENT.

The County argues that, in deciding whether a conflict exists, this Court should ignore the Delaware Supreme Court's decision in *New Castle County School District v. State,* 424 A.2d 15 (Del. 1980). It contends that the Delaware Supreme Court "never had to reach any issue about the applicability of federal takings law" because the court could have decided the case under state law grounds. Eagle County Br. in Opp'n at 10. What the Delaware court could have done, however, does not matter. The court did rule on the federal question. It held that "the federal and the state law questions are essentially one and the same." 424 A.2d at 16. It then concluded that, under both standards, "property which is held in a proprietary capacity cannot be taken by the State unless just compensation is paid." 424 A.2d at 17. That holding creates a genuine conflict.

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[5] The cities similarly raised the issue in their Petition for Certiorari to the Colorado Supreme Court. App. 267a.

The County also asserts that state law, rather than federal law, determines whether a Colorado municipality may assert a takings claim against another Colorado state subdivision in a Colorado state court. This contention lacks merit. It is true that state court standing rules may differ from the rules in federal court. *See, e.g., Doremus v. Board of Education*, 342 U.S. 429 (1952) (taxpayers lack standing in federal court even if they have it in state court). In this case, however, the Colorado Court of Appeals did not base its decision that cities lack standing on any state law standing rules. Instead, it interpreted the Fifth and Fourteenth Amendments as not granting the cities any constitutional rights against the County.[6] The proper interpretation of the Constitution is a question of federal law appropriately decided by the Supreme Court. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 327 (1819).

Respondents also misconstrue the position of the cities concerning the significance of their "home rule" status, and the importance of the fact that they are operating in their proprietary capacity in the construction and operation of this water project. Respondents claim that neither contention raises a federal issue, and therefore this Court should refrain from exercising its jurisdiction. Eagle County Br. in Opp'n at 11-12. This argument misses the point. The question is whether the original "creatures

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[6] The court below based its decision on *Town of Orchard City v. Board of Delta County Commissioners*, 751 P.2d 1003 (Colo. 1988). That case relied solely on federal authorities to determine the standing of a municipality to assert Fourteenth Amendment rights. *See* 751 P.2d at 1006 n.3.

of the state" reasoning, upon which this Court's early standing cases rests, remains viable in view of the cities constitutionally created home rule status and the nature of their actions in purchasing the water in question and constructing a project to deliver that water to their citizens. Simply stated, it does not. See Petition for Writ of Cert. at 21; *Mesa Verde Co. v. Montezuma County*, 831 P.2d 482, 485 (Colo. 1992); *City of Northglenn v. City of Thornton*, 193 Colo. 536, 542, 569 P.2d 319 (1977) (it is well settled that a city in operating a water works system acts in its proprietary capacity and is largely governed by the same rules that apply to a private corporation).

Finally, Respondents would have this Court reach the merits of the cities' taking claim.[7] However, as this Court has previously observed, it is improper to review the merits of a case where the final order in the case is dismissed for lack of standing, and the facts have not been sufficiently developed in the trial court. See, e.g., *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968); 59 Am.Jur.2d, Parties, § 30 (1987) (when standing is put in issue, the question is whether the person whose standing is challenged is a

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[7] Contrary to the statements found in the Fund Brief in Opposition at pp. 4-5, the lower courts never reached the question of "harm" to the cities water rights in the takings context, having ruled adversely to the cities on the procedural standing question. The Court of Appeals merely held that application of the County regulations to the cities' water project did not constitute an impermissible act under the pertinent provisions of state law, i.e., Section 24-65.1-106(1)(b), C.R.S. (1990) See App. 20a. The Court never had before it the factual record necessary to determine if there had been a temporary or permanent, partial or complete, taking of the cities' water rights.

proper party to request an adjudication of the issue and not whether the controversy is otherwise justifiable or whether, on the merits, the plaintiff has a legally protected interest that the defendant's action has invaded).[8]

III. THE ISSUE OF FEDERAL PREEMPTION IS PROPERLY BEFORE THIS COURT.

As noted at the outset of this Reply, Respondents are in error when they claim that the cities have not properly preserved the federal preemption issue for review. See pp. 3-5, *infra*. See also *Webb v. Webb*, 451 U.S. 493, 501 (1981) (Supreme Court can review question adequately presented to state court, but not squarely addressed and therefore "silently resolved . . . against the petitioner.") Moreover, Respondents' assertion that the judgment below "rests on an adequate and independent state law ground," is puzzling at best. Eagle County Br. in Opp'n at 17.[9] Where federal preemption would preclude local permit denial decisions based on a state statute, preemption becomes a threshold question which must be answered *before* state law can be applied. See, e.g., *Brubaker v. Board of County Comm'rs*, 652 P.2d 1050, 1057 (Colo. 1982) (a

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[8] The decision cited by Respondents, *MacDonald, Sommer and Frates v. County of Yolo*, 477 U.S. 340 (1986) simply underscores the problem with Respondents' argument. As noted in the *Yolo* dissent, "a regulatory takings determination is closely tied to the facts of a particular case. . . . " *Id.* at 359. In this instance, all of those facts have not yet been disclosed.

[9] The independence and adequacy of the state ground upon which the lower court decision is based is itself a federal question for review by this Court. Charles A. Wright et al., Federal Practice and Procedure, § 4021 (1977).

state law is not applicable if it is preempted). Furthermore, it is always a *federal* question whether federal law has superseded state law.[10] *Angel v. Bullington*, 330 U.S. 183, 189 (1947); *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 398 (1986); see also *Street v. New York*, 394 U.S. 576, 583 (1964) (issue of whether federal question was properly raised in state court is itself a federal question). Thus, this Court should review the federal preemption issue.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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[10] Respondent does not refute the observation in Petitioners' Opening Brief that the specific consideration of "wilderness" values by the County and the court below, App. 147a-148a, was contrary to the clear Congressional directive that the project should be treated as if it were located on Forest Service lands free of the wilderness designation. Petition for Writ of Cert. at 28-29.

DISTRICT COURT, COUNTY OF EAGLE,
STATE OF COLORADO

Civil Action No. 88CV142

RESPONSE BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

CITY OF COLORADO SPRINGS AND CITY OF AURORA, Colorado municipal corporations,

Plaintiffs,

vs.

1. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO;
2. GEORGE A. GATES, DONALD H. WELCH, RICHARD L. GUSTAFSON, in their official capacities as individual members of said Board;
3. THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EAGLE, STATE OF COLORADO, in its capacity as the permitting authority under §24-65.1-101, *et seq.*, C.R.S.;
4. THE EAGLE COUNTY PLANNING COMMISSION;
5. CHARLES RIDGWAY, DAVID SLEMON, DENNIS GELVIN, DONALD PRICE, in their official capacities as individual members of said Commission;
6. THE COUNTY OF EAGLE, STATE OF COLORADO;
7. AVON METROPOLITAN DISTRICT;
8. TOWN OF AVON, COLORADO;
9. COLORADO COUNCIL OF TROUT UNLIMITED;
10. COLORADO RIVER OUTFITTERS ASSOCIATION;
11. DIVISION OF WILDLIFE, STATE OF COLORADO;
12. EAGLE COUNTY SHERIFF, in his official capacity;
13. HOLY CROSS WILDERNESS DEFENSE FUND;
14. JAMES FRANKLIN LAMONT;
15. RED CLIFF WATER AND SANITATION DISTRICT;
16. TOWN OF EAGLE, COLORADO;

17. TOWN OF GYPSUM, COLORADO;
18. TOWN OF MINTURN, COLORADO;
19. TOWN OF REDCLIFF, COLORADO;
20. TOWN OF VAIL, COLORADO;
21. UPPER EAGLE REGIONAL WATER AUTHORITY;
22. UPPER EAGLE VALLEY SANITATION DISTRICT;
23. VAIL VALLEY CONSOLIDATED WATER DISTRICT;
24. VAIL ASSOCIATES, INC.; and
25. EAGLE COUNTY HISTORICAL SOCIETY,

Defendants.

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* * *

3. THE COUNTY WAS PRE-EMPTED BY FEDERAL LAW FROM DENYING THE REQUESTED PERMITS.

The Sierra Club has provided this Court with an interesting and sometimes informative treatise on the general law of federal pre-emption. However, when it comes to the application of the doctrine to the particular facts of this case, Sierra Club's analysis falls far short of the mark. Sierra Club's argument begins with the premise that the Supreme Court was wrong in *California Coastal Commission v. Granite Rock,* 480 U.S. 572, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1988), when it assumed that the National Forest Management Act (NFMA) and the Federal Land Policy Management Act (FLPMA) pre-empted local land use regulation. Sierra Club then shifts the focus of its argument in an attempt to "hedge its bets," by asserting that even if there be federal pre-emption of local land use controls in this instance, the denial herein was "on *overwhelmingly* environmental grounds". (Sierra Club, p.

18.)[10] As to the former argument, no cogent explanation is set forth relative to why the assumption by the Supreme Court was in error, and as to the latter, one can only take it as an admission that the County's decision was "a little bit illegal".

In support of its position, Sierra Club cites numerous provisions of federal law and accompanying regulations, all of which fall into two categories – those which generally condone some kind of concurrent state regulation under the appropriate circumstances, and those which simply call for federal, state and local cooperation and coordination in the planning process. None of the citations allow the *local denial* of a federally-authorized activity on federal lands as occurred in this instance. By way of example, Sierra Club references §505 of FLPMA which states in part that rights of way require compliance with "*state* standards for public health and safety, environmental protection, . . . if those standards are more stringent than applicable federal standards". However, the Ninth Circuit held in *Columbia Basin Land Protection Association v. Schlesinger*, 643 F.2d 585 (9th Cir. 1981), that "state" standards do *not* include "local" requirements, a position cited with approval by the Tenth Circuit in reviewing the very regulations now before this Court.

> In *Columbia Basin*, the BLM issued a permit to the Bonneville Power Administration (BPA) for a power line right of way. The permit was issued under FLPMA and subject to 43 U.S.C. §1765, the section of FLPMA which Grand

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[10] On page 4 of its Brief, Sierra Club represents the applicable criteria as "predominantly" environmental.

> County sought to invoke here. As set out above, that section mandates that the right of way contained conditions requiring compliance with "state standards" concerning rights of way, if the standards are more stringent than the federal ones. 43 U.S.C. §1765, *supra*. Citing that section, Franklin County sought to require the BPA to comply with its comprehensive land use plan. In particular, the county noted that Washington state law required the county to develop such a plan. The Ninth Circuit refused to read "state standards" as including local requirements:
>
> > If Congress had meant to include local plans such as that of Franklin County, they could have easily worded the statute to reflect that intent. We therefore hold that the BPA is not required to comply with the terms of the Franklin County Comprehensive Plan.
>
> *Columbia Basin, supra,* at 606.

City and County of Denver v. Bergland, 695 F.2d 465, 485 (10th Cir. 1982). In accord: *Citizens for a Better Henderson v. Hodel,* 768 F.2d 1051 (9th Cir. 1985) ("This court has supported the right of the federal government to exercise such authority [authorization of private activities on federal lands], whether the authorized party is public or private, free of any regulatory interference by local agencies.") Similarly, in *California Coastal Commission v. Granite Rock, supra,* as quoted by Sierra Club, it was "coincident compliance with state law," 94 L.Ed.2d at 593, which was in question, *not* "local" regulation.[11]

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[11] It cannot be emphasized too often that the *Granite Rock* decision did not involve the veto of a requested state permit. In

Representative of Sierra Club's citations to the code of federal regulations is the lengthy series of references to 36 C.F.R. Part 219 (Sierra Club, p. 10), which citations Sierra Club asserts establish that "NFMA contemplates concurrent state and local regulation." (Sierra Club, p. 10.) However, if one simply reviews Part 219 in its entirety, it becomes apparent that what is involved is a process for "developing and adopting" resource management plans for national forest system lands. 36 C.F.R. §219.1. A "public participation" process is established, 36 C.F.R. §219.6, and if there is local dissatisfaction with the plan, an "appeal process" is available. 36 C.F.R. §219.10. *See also*: 16 U.S.C. §1612. Sierra Club would now have this Court believe that this regulatory scheme somehow acknowledges local regulatory authority, when in fact it merely establishes a framework for cooperation and consideration of such local concerns in the development of the federal plan, and perhaps more importantly, an appeal mechanism if it is decided that such concerns are not being adequately met by the federal agency. No such appeal of the local plan was filed by Eagle County in this instance, and it cannot now use its alleged H.B. 1041 powers to override the federal determinations.

Indicative of Sierra Club's reading of the federal permit conditions governing the federal/state/local

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fact, plaintiffs therein argued that "there is no reason to find that the [Coastal Commission] will apply the CCA's regulations so as to deprive [Granite Rock] of its rights under the Mining Act." 94 L.Ed.2d at 595. Just such deprivation has occurred in this instance.

interrelationship surrounding this particular project is its statement on pages 8-9 of its Brief:

> Exhibit 1 to the Record of Decision, "Cooperating Agencies and Permits Required," specifically lists "[p]ermits pursuant to Eagle County's and other Counties HB-1041 process" as permits required for the Cities' project to go forward. Record of Decision, Exhibit 1, Page 2.

If one did not take the time to read the permit, one could conclude from this misleading citation that the Forest Service actually made an affirmative finding that a 1041 permit would be required before the Cities could proceed with construction of the project. However, this section of the permit actually states:

> Eagle County and other Counties advise the Forest Service that various permits are needed. These permits would include:
>
> . . .
>
> 2. Permits pursuant to Eagle County's or other Counties HB-1041 process.

Thus, the Forest Service was indicating nothing further than that it had been "advised" by the County that the County felt a 1041 permit was necessary. This certainly falls far short of a federal requirement that such a local permit be obtained.

In addition, when addressing Sierra Club's citation to the permit conditions, it is imperative to note the Court's

analysis in *Brubaker v. Board of County Commissioners*, 652 P.2d 1050, 1057 (Colo. 1982), wherein it was held:

> The trial court also concluded that *Ventura County* was distinguishable because, in the present case, the appellants federally approved operating plan provided an explicit basis for local jurisdiction in stating that "[t]he operator, while conducting operations authorized by this Operating Plan, shall comply with the regulations of the U.S. Department of Agriculture and all federal, state, county and municipal laws, ordinances, or regulations applicable to the area or operations covered by this plan." We find this distinction unpersuasive. *First, the provision only allows for the operation of "applicable" state and local regulations. Since the state law is not applicable if it is pre-empted, the scope of the provision is dependent upon, rather than determinative of, the proper resolution of the pre-emption issue.* Second, even if this provision were construed as an attempt to preserve state and local laws that otherwise would be pre-empted, such a savings clause would be void as beyond the power of the Forest Service Ranger issuing the permit. (Emphasis added.)

Thus, any reference to local requirements in the instant federal permits does not answer the federal pre-emption question.

Finally, though the Sierra Club makes a valiant attempt to characterize all of the County conditions as "environmental" in nature, such is simply not the case. For example, the Board found:

> 4. (6.04.15.1.o) There will be a significant deterioration in public outdoor recreational

areas because of loss in the quality and quantity of the river rafting experience and construction disturbances in the Wilderness Area. (Appendix F, p. 4.)

6. (6.04.16.1.p) Reduction in stream flows and construction activities in the Wilderness Area will result in a significant degradation of natural scenic characteristics. (Appendix F, p. 5.)

10. (6.04.15.1.l) The benefits of the proposed development do not outweigh the losses of natural resources. (Appendix F, p. 5.)

11. (6.04.15.1.c) There will be an adverse effect on the water rights because water quality is a protected element of a water right, and there will be a reduction in downstream water quality. (Appendix F, p. 5.)

15. (6.04.15.1.p) The proposed development will cause nuisance factors such as increased traffic, dust, fire hazards, and dangers from hazardous chemical contamination, explosives and fuels. The mitigation measures proposed by the Cities fail to adequately satisfy this criteria. (Appendix F, p. 5.)

20. (6.04.15.1.k) There may be easements required for tunnels through mining claims. (Appendix F, p. 6.)

1. (2.09.02.13.f) There will be an adverse effect to private property owners. (Appendix F, p. 8.)

1. (2.09.04.1.a) The Project is not compatible with other existing uses. (Appendix F, p. 9.)

2. (2.09.04.1.b) For purposes of this Application, the "neighborhood" is the Wilderness

> Area and adjacent lands. As such, there will be an overall negative effect on the character of the neighborhood. (Appendix F, p. 9.)
>
> 2. [Certificate of Designation] The disposal site is not compatible with surrounding property. (Appendix F, p. 9.)

The "quality and quantity of the river rafting experience" is a land use decision, i.e. will the County have water diversions or aquatic playgrounds? Similarly, regulation of the area as a "wilderness" under Finding No. 6 on page 5 of Appendix F is a land use choice, with construction activities deemed inconsistent with that land use determination. Though water quality can be categorized as an environmental concern, water rights are an individual property interest in Colorado, and their protection is thus more akin to land use control. In fact, even the "nuisance factors" referenced in Finding No. 15 on page 5 of Appendix F have been historically characterized as matters within the ambit of the local "zoning" authority. *Robinson Company v. Luthi*, 115 Colo. 106, 111, 169 P.2d 171 (1946); *C & M Sand and Gravel v. Board of County Commissioners*, 673 P.2d 1013, 1017 (Colo.App. 1983).

On a similar note, Finding No. 1 under §2.09.02.13, which references adverse effects on private property owners, and Finding No. 1 under §2.09.04, which indicates incompatibility with other existing uses, are clearly land use controls, as is finding No. 2 under the Certificate of Designation Application criteria, i.e. the disposal site is not compatible with surrounding property. Thus, even assuming for purposes of argument that the County regulations are not totally pre-empted, even though its decision was an outright denial and its imposition of

environmental regulations was overly severe, it must be acknowledged that the County has attempted to impose land use controls upon the property despite the pre-emptive impact of the provisions of the NFMA and the FLPMA.

* * *